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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/659,767	09/09/2003	James C. Smith	P00195US2	4861
7590	12/13/2005		EXAMINER	
The Law Offices of James C. Weseman Suite 1600 401 West A Street San Dieg, CA 92101			LUDLOW, JAN M	
			ART UNIT	PAPER NUMBER
			1743	

DATE MAILED: 12/13/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/659,767	SMITH, JAMES C.	
	Examiner Jan M. Ludlow	Art Unit 1743	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS; WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 11/2/2005.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-4 and 6-13 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-4 and 6-13 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 09 September 2003 is/are: a) accepted or b) objected to by the Examiner. Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a). Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: _____.

1. Claims 1-4, 6-13 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. There is no support for "quadrilateral" in the specification as originally filed. The disclosure supports "rectangular" which is narrower than "quadrilateral." The specification as originally filed does not support "an automated reader in close proximity to said probe".
2. Claims 1-4, 6-13 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The limitation "perceptible by an automated reader in close proximity to said probe" is unclear because neither element is a claimed portion of the invention, and the position of the probe and/or reader is not necessarily fixed relative to the container or each other. "Close proximity" is unclear because it is a relative term lacking comparative basis.

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

1. Claims 1-4 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fechtner in view of Ushikubo.

Fechtner teaches a reagent vial having containers 16, 18, 20 with inlets 60 aligned with substantially hemispherical portions 80, 82, 84 aligned with each inlet and having smaller cross-section than the rest of the container.

Fechtner fails to teach a substantially rectangular cross-section or label.

Ushikubo teaches reagent containers for an automatic analyzer. The reagent containers are substantially rectangular and have identifying labels 28 (Figures 5A and 6A) in order to automatically identify reagents.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to make the vessels of Fechtner substantially rectangular as taught by Ushikubo in order to maximize the volume of reagent per rotor sector and to provide labels in order to permit automated reagent identification as taught by Ushikubo. The labels of the combination are provided on a side wall of the upper end of the container, where the upper end is the rectangular portion and the lower end is formed by the substantially hemispherical portions.

2. Alternatively, claims 1-4 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fechtner in view of Ushikubo and Court.

Fechtner teaches a reagent vial having containers 16, 18, 20 with inlets 60 aligned with substantially hemispherical portions 80, 82, 84 aligned with each inlet and having smaller cross-section than the rest of the container.

Fechtner fails to teach a substantially rectangular cross-section or label.

Ushikubo teaches reagent containers for an automatic analyzer. The reagent containers are substantially rectangular and have identifying labels 28 (Figures 5A and 6A) in order to automatically identify reagents.

Court teaches a reagent vial with an over cover including a bar code on an upper surface adjacent the vial opening (Fig. 5, col. 2, lines 55-60).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to make the vessels of Fechtner substantially rectangular as taught by Ushikubo in order to maximize the volume of reagent per rotor sector and to provide labels in order to permit automated reagent identification as taught by Ushikubo. It would have been obvious to provide the label on a cover adjacent the inlet opening in order to label inlet openings in an ideal location as taught by Court.

3. Claims 1-4, 6-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baxter in view of Ushikubo.

Baxter teaches a vial 1 with inlet 5 aligned with smaller diameter hemispherical lower portion 3. The vial fits in an adapter 6 with horizontal locator 10 and vertical locator 12 (col. 3, lines 1-5, Figures 3, 5, 7-8).

Baxter fails to teach a substantially rectangular cross-section or label.

Ushikubo teaches reagent containers for an automatic analyzer. The reagent containers are substantially rectangular and have identifying labels 28 (Figures 5A and 6A) in order to automatically identify reagents.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to make the vessels of Baxter substantially rectangular as taught by Ushikubo in order to maximize the volume of reagent per rotor sector and to provide labels in order to permit automated reagent identification as taught by Ushikubo. The labels of the combination are provided on a side wall of the upper end of the container, where the upper end is the rectangular portion and the lower end is formed by the substantially hemispherical portion.

4. Alternatively, claims 1-4, 6-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baxter in view of Ushikubo and Court.

Baxter teaches a vial 1 with inlet 5 aligned with smaller diameter hemispherical lower portion 3. The vial fits in an adapter 6 with horizontal locator 10 and vertical locator 12 (col. 3, lines 1-5, Figures 3, 5, 7-8).

Baxter fails to teach a substantially rectangular cross-section or label.

Ushikubo teaches reagent containers for an automatic analyzer. The reagent containers are substantially rectangular and have identifying labels 28 (Figures 5A and 6A) in order to automatically identify reagents.

Court teaches a reagent vial with an over cover including a bar code on an upper surface adjacent the vial opening (Fig. 5, col. 2, lines 55-60).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to make the vessels of Baxter substantially rectangular as taught by Ushikubo in order to maximize the volume of reagent per rotor sector and to provide labels in order to permit automated reagent identification as taught by Ushikubo. It would have been obvious to provide the label on a cover adjacent the vial opening in order to label vials in an ideal location as taught by Court.

5. Applicant's arguments filed October 26, 2005 have been fully considered but they are not persuasive.

6. Applicant argues that the combination of Fechtner and Ushikubo teaches a barcode on a different **surface** than the surface for probe access, but the instant claims are not so limited. In the combination of Fechtner and Ushikubo, the substantially rectangular portion is the container portion and the "upper end" is interpreted as a three dimensional structure because the "lower end" clearly is a three dimensional structure in that it is configured to provide a chamber in the instant claims. The bar code on the side wall is on an upper end of the container as explained above and readable by a reader in close proximity to the probe as shown in Figure 2 of Ushikubo. Similarly, the upper end of Baxter and Ushikubo is the larger diameter portion, and a barcode on the side of this portion would label the "upper end" as claimed. Arguments with respect to intended use with a modular head having both a reagent probe and reader head are not germane because the modular head is not claimed, and the claims as written do not require the label and probe opening to be on the same **surface**.

Alternative rejections have been made based on applicant's arguments.

7. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jan M. Ludlow whose telephone number is (571) 272-1260. The examiner can normally be reached on Monday-Thursday, 11:30 am - 8:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jill A. Warden can be reached on (571) 272-1267. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1743

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Jan M. Ludlow
Primary Examiner
Art Unit 1743

Jml
November 28, 2005